IN THE

Supreme Court of the United States

October Term, 1943.

No. 473.

MAX KRAUSS, Trading as AMERICAN CORD AND WEBBING COMPANY,

Petitioner,

v.

BENJAMIN GREENBARG and JOSEPH GREENBARG, Trading as KING KARD OVERALL COMPANY,

Respondents.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

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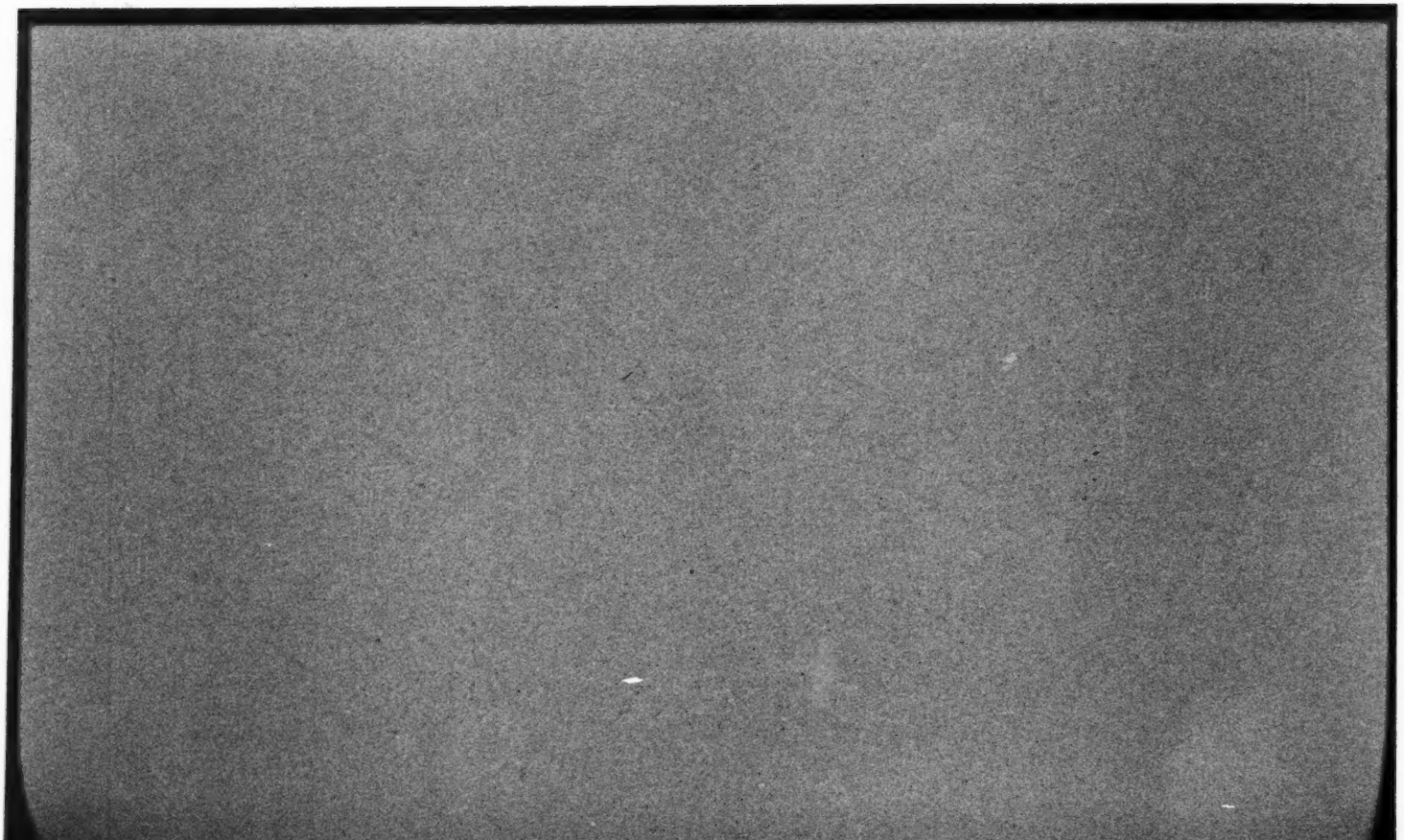

CASES CITED IN PETITION.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes Max Krauss, trading as American Cord and Webbing Company, and respectfully petitions your Honorable Court for a reconsideration of his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania.

The said petition was submitted under No. 473 of October Term, 1943, and was denied on November 22, 1943; and while counsel for petitioner is not unmindful that full consideration was given to the petition, he feels that the denial may have been, and probably was, due to the fact

that, in his anxiety to stress and demonstrate the legal errors of the said Circuit Court of Appeals, he overlooked, and certainly did not sufficiently address himself to, the primary and essential question of the public importance involved therein.

Counsel is convinced, and respectfully submits, that the said decision of the Circuit Court of Appeals transcends by far the narrow limits of the mere private rights of the parties, and that the interests of the public are greatly and largely affected thereby. Thus

I. The ruling that the law of Pennsylvania as to liability for *special* damages differs from that laid down by this Court in *Globe Refining Company v. Landa Cotton Oil Company,* 190 U. S. 540, and adhered to in England (vide English cases cited by Holmes, J., ibid.) and by numerous state courts in this Country, in that in Pennsylvania mere foreseeability of special damages imposes liability therefor, even in the absence of any implied assumption thereof, is—as was pointed out on pp. 27-29 of the petitioner's supporting brief— directly contrary to the applicable Pennsylvania decisions. The inevitable effect of this ruling, if sustained, would be that actions for special damages, which were foreseeable but in no way tacitly or impliedly assumed, if brought in a Pennsylvania State Court, would result in a judgment for the defendant, while in similar actions, involving exactly similar facts, and brought in a Federal Court located in Pennsylvania, judgment would necessarily have to go to the plaintiff. We would thus have two diametrically different systems of law prevailing in the same state, which would lead to endless confusion and uncertainty, and would defeat and subvert the very

policy of legal uniformity which was enjoined by your Honorable Court in *Erie R. R. v. Tompkins,* 304 U. S. 64.

Another inevitable result of the ruling here complained of would be that in an action for special damages instituted in a Federal Court in this Circuit under a contract entered into, or required to be performed, in Pennsylvania the law to be applied thereto would necessarily be the very opposite of that which the same Federal Court would have to apply if that contract was entered into, or the performance thereof was to be had, let us say, in the District of Columbia or the State of New York, thus introducing an irreconcilable conflict in the administration of justice in matters of commerce wherein uniformity is of the very essence, and has been consistently sought after as evidenced by the adoption of the Uniform Sales Act and kindred mercantile legislation.

All of this confusion and disharmony would manifestly be avoided if the said ruling of the Circuit Court of Appeals is disapproved, and the law of Pennsylvania is adjudged to be as contended by your petitioner, thus bringing it into conformity with all prior applicable decisions of this State, and with the applicable law of other jurisdictions—Federal and State.

II. There are now outstanding throughout the Country numerous Government contracts involving many millions, possibly billions, of dollars, and requiring elaborate and complicated mechanical processes for the performance thereof. Most of them contain, as a standard provision therein, that of Article 17 of the contract involved in the instant case (Record pp. 311a-312a) to the effect,—

> "That the contractor shall not be charged with liquidated damages or any excess cost when the delay

in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market, if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof, or within such further period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final settlement of the contract, grant for the giving of such notice."

Counsel believes and respectfully submits that from the very nature of things accidental and unanticipated mechanical breakdowns will occasionally occur, and the question whether the delayed performance resulting therefrom is embraced within the protection of that provision will necessarily arise and lead to disputes and disagreements between the Government and contractors, involving large amounts of money. While this question was answered in the negative by the Circuit Court of Appeals in the case at bar, this obviously will not definitely and permanently settle it throughout the country at large. For it will undoubtedly arise from time to time in other Circuits to be repeatedly contested and fought over. The situation thus presents an important question of federal law, which the petitioner's counsel believes has not been, but should be, settled by your Honorable Court so that multiplicity of litigation and a possible conflict of decisions may be obviated.

Wherefore, your petitioner by his counsel whose signature is subscribed, prays that his petition for a writ of certiorari may be reconsidered.

Counsel certifies that this petition is presented in good faith and in the sincere belief that it has merit, and not for the purpose of delay.

And your petitioner will ever pray, etc.

MAX KRAUSS, Trading as AMERICAN CORD AND WEBBING COMPANY,
Petitioner,
By B. D. OLIENSIS,
Counsel.